

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

---

BERNARD TYLER, 04-B-1207,

Petitioner,

-v-

**DECISION AND ORDER**  
08-CV-6560B

JAMES CONWAY, Superintendent,

Respondent.

---

---

Before the Court is petitioner's *pro se* motion (Docket No. 11) to stay his petition in order to permit him to return to state court to exhaust his remedies regarding certain claims which are presently unexhausted. Petitioner indicates that he intends to amend his petition to include the claims regarding 1) ineffective assistance of counsel, 2) prosecutorial misconduct, 3) insufficient evidence, and 4) violation of the right to Confrontation. He states that he has commenced state court collateral attacks to exhaust these claims. Respondent has no opposition to granting the stay (Docket No. 13).

Accordingly, the Court, in its discretion, will stay petitioner's exhausted claims pending in his original petition. Petitioner is directed to amend his petition to include all of the claims on which he intends to proceed. Petitioner is directed to file an amended petition containing all of his claims – both the exhausted and the unexhausted claims – by **June 23, 2009**. If petitioner presents the unexhausted claims to the appropriate state courts and returns to this Court within the time limits set forth below, the Court will evaluate the amended petition. *See Zarvela v. Artuz*, 254 F.3d 374, 381-382 (2d Cir.), *cert. denied sub. nom. Fischer v. Zarvela*, 534 U.S. 1015, 122 S.Ct. 506, 151 L.Ed.2d 415 (2001).

The action is stayed until petitioner notifies the Court that he has completed his efforts to exhaust. This stay is conditioned on petitioner's return to the district court within 30 days of the completion of the effort to exhaust. If petitioner does not return to federal court within this time frame, this stay may later be vacated *nunc pro tunc* as of the date the stay was entered, and the petition may be dismissed if it is not still timely. *See id.* Accordingly,

IT HEREBY IS ORDERED, that Petitioner is directed to file an amended petition containing all of his claims – both the exhausted and the unexhausted claims – on which he intends to proceed by **June 23, 2009**;

FURTHER that to the extent petitioner's claims in his amended petition are unexhausted, the claims will be dismissed without prejudice subject to the condition that petitioner return to this Court within 30 days of the completion of the effort to exhaust, at which time the newly exhausted amended claims will be re-instated in the Court's evaluation of the amended petition; and

FURTHER, that this action is stayed pending petitioner's exhaustion of the amended claims.

**IT IS SO ORDERED.**

/s/ *Victor E. Bianchini*

---

Victor E. Bianchini  
UNITED STATES MAGISTRATE JUDGE

Dated: May 21, 2009  
Rochester, New York